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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938.

No. 358

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED,

Plaintiff-Petitioner,

against

LEHIGH VALLEY RAILROAD COMPANY,

Defendant-Respondent.

DEFENDANT-RESPONDENT'S BRIEF ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK.

HOWARD DORE,
HAROLD S. SIMPSON,
Counsel for Lehigh Valley Railroad Company,
Defendant-Respondent.

File No. 37,055

I.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932.

No. 359

MARY ROCCO, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JOSEPH ROCCO, DECEASED,

PLAINTIFF-PETITIONER,

against

LEHIGH VALLEY RAILROAD COMPANY,

DEFENDANT-RESPONDENT.

BRIEF OF LEHIGH VALLEY RAILROAD COMPANY, DEFENDANT-RESPONDENT.

I.

Statement of Case.

This action was brought under the authority of the Federal Employers' Liability Act. One Joseph Rocco was killed while engaged in his employment for the Lehigh Valley Railroad Company.

The decedent was employed as a track inspector on a branch of defendant's railroad running between Auburn, N. Y., and Ithaca, N. Y. Ithaca, N. Y., is the south terminus

of the branch. His duty was to inspect the track twice each day from Ithaca, the south terminus of the branch, to the end of the Ithaca section, about seven and a half miles north of Ithaca. He had been employed by the Lehigh Valley Railroad Company for between twenty and twenty-five years (R. 20). He covered his assigned section by means of a three wheeled vehicle known by railroad men as a "speeder." The speeder is a three wheeled vehicle operated by foot and carries equipment for making minor repairs along the tracks. It is built so that it can be readily picked up and removed from the tracks (R. 113).

The branch of the railroad upon which the decedent worked runs along the shore of Cayuga Lake and in stormy weather the track is subject to washouts (R. 95, 96). The primary purpose of his work was to protect the two passenger trains a day which traverse the branch line, two in each direction, between Auburn and Ithaca.

He preceded each passenger train in each direction. At the time the decedent met his death, a train left Ithaca at 7:40 o'clock in the morning for Auburn. On its return trip it arrived in Ithaca at 12:23 P. M. It departed again for Auburn at 4:55 P. M. and returned to Ithaca from Auburn at 8:30 P. M. (R. 21). The decedent's schedule was as follows: He left Ithaca at 6:30 in the morning and proceeded north to the end of his assigned track. He returned to Ithaca at 12 o'clock, went out again at 3:30 in the afternoon and came in at 8 o'clock at night (R. 20, 43, 44). It thus appears that he preceded by a short time the passenger trains running in each direction.

On the Auburn and Ithaca branch, in the latter part of October or early part of November, 1920, there was promulgated a rule that track walkers should not occupy the main track with speeders or any other obstructions, without first ascertaining from the operator the whereabouts of the approaching trains in both directions (R. 163). The decedent was specifically and repeatedly instructed as to the rule and warned against infractions thereof (R. 111, 112, 115, 123, 124, 147, 148). His predecessor, in the year 1921,

had received the same instructions (R. 49). On the day the decedent was killed, December 8, 1927, there had been heavy washouts on the Ithaca-Auburn branch. They occurred all along the line by reason of heavy storms (R. 34, 35, 169). By reason of the washouts the train southbound from Auburn to Ithaca, due to arrive in Ithaca at 12:23 P. M., was delayed and reached Ludlowville, N. Y., the last reporting station prior to reaching Ithaca, at 3:14 P. M. (R. 150). Ludlowville is eight miles north of Ithaca (R. 155).

On that day Rocco left Ithaca at 3:30 P. M. without making inquiry as to the whereabouts of the train (R. 122, 123). He collided with the train at a point approximately 663 feet north of the highway crossing leading into Stewart Park in the City of Ithaca. He was struck by the train due in Ithaca at 12:23 and was killed (R. 64, 78). After stopping because of the accident, the train proceeded to Ithaca and arrived in Ithaca at 4 P. M. (R. 151).

All the facilities of the railroad were afforded the decedent for his protection from trains (R. 124, 125). Had Rocco inquired of the dispatcher he would have been informed that the train which struck him had left Ludlowville, eight miles north of Ithaca, at 3:14 P. M. (R. 155). It would then have been left to Rocco himself to determine at what time he wanted to leave the station to clear this train (R. 125).

POINT I.

The evidence is insufficient in law to support a verdict for the plaintiff.

Section 457A of the Civil Practice Act of the State of New York provides as follows:

> "The Judge may direct a verdict when he would set aside a contrary verdict as against the weight of evidence."

This court has held that it will examine the record and if it is found as a matter of law that the evidence is not sufficient to sustain a verdict it will reverse.

C. M. & Ct. P. Railway Co. v. Coogan, 271 U. S. 472, 474.

Whether the Court of Appeals of New York has held that a verdict should have been directed pursuant to section 457A of the Civil Practice Act or whether it has reversed the judgment for the reason that the evidence is insufficient in law to sustain a verdict for the plaintiff, and without regard to whether this court gives consideration to whether a verdict should have been directed under the procedure in vogue in New York, or considers the case with a view to determining whether the evidence as a matter of law fails to sustain the verdict for the plaintiff, it is submitted that a verdict for the plaintiff is not warranted in the light of the applicable decisions of this court.

The evidence as a matter of law

A. Will not warrant a finding of negligence on the part of the defendant.

B. Conclusively charges the decedent with negligence which was the primary and sole proximate cause of the accident.

C. Conclusively charges the decedent with having assumed the risk of the accident which caused his death.

The submission of the case to, and the verdict by, the jury was based entirely upon alleged negligence of the engineer in failing to sound a whistle for the benefit of the decedent upon approaching a curve beyond which his view was obstructed. Plaintiff-Petitioner's counsel assumes that by the verdict, the failure to signal is established as a fact in this case. Respondent urges that even though no such duty existed as respects the decedent, the evidence is insufficient in law to warrant a finding that timely warning was not given.

One Fred Stevens was the plaintiff's only witness as to signals. He testified that as Rocco came up to him just

prior to the accident, they had a conversation. (R. 61)

The following is the testimony upon which the case was permitted to go to the jury on the question of the defendant's negligence:

"Q. Tell us what if anything, you observed about whistle signals if any occurred on that train.

A. At that time, at that certain time that this happened?

Q. Not what they do other times but this time Fred?

A. I don't think so; I can't recall of any whistle blowing at that time because the first thing I heard. . ." (R. 63)

Cross-examination

"Q. You will swear that he didn't blow this whistle?

A. I didn't hear it." (R. 84)

"Q. But you are willing to swear "I heard the train whistle, I looked up and saw the train and speeder on the track and then the motor car struck the speeder." Did you say that?

"A. I do recall I can safely say that the train whistled at the same time it came around the curve within a question of ten seconds.

Q. Do you recall that you heard the train whistle?

A. I don't know as I really could swear to it because the train does blow at this curve.

Q. If you told it to him on the 10th of December, it must have been right?

A. I don't know whether I told him or not.

Q. What do you say now, did you hear it whistle or didn't you?

A. I won't swear to it.

Q. You won't swear that you told him or didn't?

A. I don't know anything what I told him. It was very immaterial to me." (R. 86)

Re-direct examination:

"Q. This is no fooling matter between you and Mr. Cobb, you and me, you and the Court, or you and the jury. We want to know, everyone wants to know what you heard and what you saw. Now I ask you, under oath, your oath as you sit there, whether you heard this whistle back of the curve or not?

A. I didn't hear any whistle back of the curve.

Q. Now I ask you if whether just prior to the impact you heard a whistle?

A. No I won't swear that I did.

Q. May you have heard a whistle just prior to the impact?

A. I might but I won't swear that I did.

Q. What is your best recollection, your honest recollection about it?

A. I don't think to my best recollection that the whistle blew at that time." (R. 87)

Reference is particularly made to pages 86 and 87 of the Record as to the testimony of Stevens. It is not only contradictory, but is insufficient on its face to support a finding that a warning was not given.

Gulf R. R. Co. v. Wells, 275 U. S. 455.

On the other hand each member of the train crew testifies to warning signals which were being given for Stewart Park crossing from a whistling post at a point approximately 1000 feet north of the point of the accident to the time and place of the accident. (R. 170, 171, 198, 199, 206, 208, 212.)

Subsequent points deal with the questions of decedent's negligence and his assumption of the risks.

POINT II.

The question of whether a duty exists to sound warning signals is one of law, and is not to be resolved by a jury out of inferences of fact to be drawn from incompetent evidence, inapplicable rules of a railroad, and speculation.

By process of reasoning hitherto not employed in this case, the Plaintiff-Petitioner has sought to build up out of a series of facts, theories and circumstances, a duty upon the motorman to sound, for the benefit of the decedent, a warning upon the curve on which this fatal accident occurred.

The duty to warn, it is claimed, arises (a) by virtue of defendant's written rules, (b) by virtue of its customary practice, (c) by virtue of the exercise of ordinary care and prudence in the circumstances. It is then argued that if anything is lacking by which a duty to warn may not be resolved out of either (a), (b) or (c), then by combining them all that duty may be spelled out.

The Defendant-Respondent takes up the discussion of these theories under the sub-title designations given them by the Plaintiff-Petitioner.

(a) The rule book of the Lehigh Valley Railroad Company specifies that the symbol "O" signifies a short blast of the whistle, and the symbol "—" represents a longer blast. Subdivision D of Rule 14 provides as follows:

> "(q) O—O running against current of traffic; when approaching highway crossings immediately after sounding the prescribed whistle signals and approaching curves and other points where the employees may be at work on track or bridges."

This rule was introduced in evidence at page 54 of the Record over the objection of the defendant.

Rule 1028 provides as follows:

> "Enginemen of engines running light must exercise great care in looking out for motor cars, handcars and trucks and sound the whistle frequently at dangerous places, or where the view of the approaching trains are obstructed, to warn the employees using these cars of their approach."

This rule was introduced in evidence on pages 55 and 56 of the Record over the objection of the defendant.

Neither of the rules is applicable. Neither had anything to do with the movement which was taking place at the time of the fatal accident. The Ithaca branch is a single track road. (R. 162) The rule being printed in the rule book in bold face type, on its face and by the language of the rule book itself, does not apply to single track roads. (R. 140, 142, 162) It is common knowledge that the expression "running against the current of traffic" applies only to trains running on double track roads in a direction opposite to the customary flow of traffic. Such is the proven fact of the case. (R. 125, 162) Plaintiff-Petitioner urges that the testimony of one Truman (R. 115) makes it a question of fact whether the rule does or does not apply to a single track road. It is needless to refute this claim since the record is bare of any evidence that the train in question was running against the current of traffic and replete with evidence that it was not.

The train in question was an ordinary gasoline train of two cars. (R. 173) It was a regular train, running on a regular schedule. (R. 151) It was thus not running light.

There is nothing in the evidence with respect to the rules from which it may be inferred that it was the duty of the engineer to signal for the benefit of track inspectors at the curve and at the time in question. He cannot be deemed to have committed a wrongful act because he may have failed to comply with a rule which had no application.

It is not conceivable that every rule requiring the sounding of a warning may be introduced into evidence and made the basis of a verdict without regard to its application.

That the rules Subdivision D of Rule 14, and 1028 respectively may be made the foundation of a verdict for the plaintiff and of the establishment of a duty toward Rocco, there must be proof that the train that struck him was (1) "running against the current of traffic" and (2) "running light." This was not only not susceptible of proof, but in each case the contrary is absolutely established.

(b) By the testimony of one Kish, the plaintiff's witness, who stated that trains running south had during the time of his employment blown a whistle at this crossing (R. 47), the Plaintiff-Petitioner urges that there has been established a custom to signal at the curve upon which Rocco was entitled to place reliance.

A train running south passes a whistling post 852 feet, plus 253 feet, plus 366 feet, a total of 1471 feet, north of the entrance to Stewart Park in the City of Ithaca (R. 25, 26). Pursuant to the rules of the road the highway crossing whistle warning must be given so as to start a blast at the whistling post and prolong the blast to a point not to exceed 200 feet from the crossing (R. 194). The curve at which the accident occurred is well within the space within which the regular crossing whistle must by this rule be blown. The accident happened 663 feet north of the crossing entrance to Stewart Park (R. 78). Thus no custom is inferable or was proven of signaling at the curve for the benefit of trackwalkers or other employees. The regular sounding of a crossing whistle at the curve in pursuance of the recognized legal duty to persons using the highway crossing cannot be deemed to have established a custom of signaling for employees. And under the established doctrine of this Court since the deceased was not within that class of persons for whose benefit the highway crossing warning is given, the failure to give such signal warrants no foundation for a cause of action for the decedent's death.

Chesapeake & Ohio Railroad Co. v. Mihas, 280 U. S. 102.

O'Donnell v. Providence & Worcester Railway Co., 6 R. I.

211, cited with approval in C. & O. R. R. Co. v. Mihas, supra.

Carfellow v. D. L. & W. R. R. Co., 54 Federal 2nd 475.

(c) Lastly, the petitioner urges that under the circumstances there was a duty in the exercise of ordinary care and prudence to give a signal on approaching a curve.

The Lehigh Valley Railroad Company had promulgated two rules governing Rocco's conduct.

Rul 823 provides as follows:

> "Employees must stand outside and clear of all main tracks while trains are passing; they must expect trains to run at any time on any track in either direction. All employees are further warned that they must not rely on others to notify them of the approach of a train. (R. 139).

Without regard to rule this court and the Federal District and Circuits Court of Appeal have laid down a similar course of conduct for track inspectors.

Chesapeake & Ohio Railroad Co. v. Nixon, administrator, 271 U. S. 218

Biernacki v. Pennsylvania Railroad Co., 45 Federal 2nd 677. Certiorari denied 283 U. S. 841.

Reynolds v. New York, Ontario & Western R. R., 42 Federal 2nd 164

Another rule, separate and distinct from Rule 823, but which supports and gives force and reason to Rule 823, is the oral rule prohibiting operators of speeders similar to that used by Rocco from occuying the main track without first ascertaining from telegraph operators the whereabouts of approaching trains in both directions (R. 163). Every telegraph facility of the road was made available to Rocco to enable him to get this information (R. 124, 125). At this point it is intended to discuss the effect of these rules with respect only to the question of negligence of the engineer.

To support the theory that ordinary care and prudence required the giving of a signal on approaching a curve, the plaintiff cites several cases. Without re-citing or attempting to enter into a discussion of the facts of each case, it may be fairly said that in each case the engineer had actual knowledge of the danger and actual knowledge of the presence of the workmen in the place of danger. In the case of Chicago, Milwaukee & St. Paul v. Kane, 33 Federal 2nd 866, cited by the plaintiff, there was so much actual knowledge of danger to the employee on the part of the engineer that the court held it a case for the jury on the doctrine of "last clear chance".

In the case at bar there is no evidence from which it can possibly be inferred that the engineer expected to meet Rocco or any other employee on the curve. Had Rocco obeyed the rules (and the engineer had the right to assume that he would) there would not only have not been a remote possibility of danger to Rocco with the resulting necessity of warning him, but it would have been definitely certain that he would not have been on the track.

The validity and force of the rules in question have not at any time been seriously attacked in this case. The evidence to support them is overwhelming and abundant, and is discussed more fully in subsequent Points. The engineer was entitled to depend on Rocco's obedience of them.

Insofar as Rocco was concerned, the train which struck him was to all intents and purposes on time. Plaintiff-Petitioner urges that the lateness of the train created an unusual and extraordinary condition. But the information which he should have obtained in the proper exercise of his duty dispels any claim that as to Rocco there was an unusual, extraordinary or surprise movement. There was available to him, and he was charged with obtaining, information far more definite, specific and reliable than a train schedule or time table. This lateness of the train charged the engineer with no extra duty of caution with respect to Rocco.

It is thus submitted that upon no theory has the plaintiff made out a duty, and the breach thereof, on the part of the engineer to signal for the benefit of Rocco on approaching the curve. No rule prevailed, no custom had been established, and no duty of care towards Rocco (whose presence on the track was not possible of anticipation) required such warning. If, under no theory was there a duty to give warning to Rocco, it is inconceivable that such duty can be deemed to spring into being upon a combination of all three theories.

The weakness of the argument that even though under theories (a), (b) and (c) no duty arose to give a warning signal at the curve, then upon a combination of all, the duty did arise, seems very clear if consideration be given to the acts and duties of the engineer at the particular time and place. He was busily engaged in the operation for which a railroad primarily exists, that of getting his train to its destination. The duty imposed upon him by law was to perform that task in the manner in which it would be performed by a reasonably prudent man. No reasonably prudent man engaged in the operation in which this engineer was engaged could be expected to be giving attention to inapplicable rules, unestablished customs, and the possibility of negligence of Rocco, and because of the combination deem himself obligated to give a special signal at the curve.

POINT III.

The doctrine of Chesapeake & Ohio Railway Co. v. Nixon, 271 U. S. 218 controls the case at bar and the plaintiff may not recover. By its doctrine the decedent in the case at bar was not only guilty of primary negligence, which negligence was the sole proximate cause of the accident, but the accident occurred out of circumstances and conditions the risk of which he assumed.

The language of this Court in the Nixon case warrants

the construction (a) that at the time that Nixon was killed the employees of the railway company who were operating the engine which struck Nixon, were negligent, (b) that such negligence was not the primary cause of the accident, (c) that the negligence of Nixon was the primary cause of the accident, and (d) that the nature of Nixon's work was such that he assumed the risk of the danger of being run down in the manner in which he was killed.

(a) In digesting the opinion in respect of how this Court treated the question of the negligence of the railroad servants who were operating the engine, we find the following significant language:

> "For reasons that the jury found insufficient to excuse the omission, the engineer and fireman of the train were not on the lookout and the question raised is whether as toward the deceased, the defendant owed a duty to keep a lookout or whether on the other hand the deceased took the risk." Page 219.

> "The duty of the railroad company towards this class of employees was not affected by that which it might owe to others." Page 220.

We submit that this phraseology admits of no other construction than that a failure to watch on the part of the operators of an engine is, and may properly be found by a jury to be, negligence.

(b) Since it is unquestionably true under the Federal Employers' Liability Act that contributory negligence on the part of the employee does not defeat a recovery and further that under ordinary circumstances an employee does not assume the risk of negligence of a co-employee, it must be assumed that this Court held that Nixon's negligence which is hereinafter discussed, was the primary negligence resulting in his death, and that while there may have been negligence on the part of the operators of the engine in not keeping a lookout, such failure to keep a lookout was not a breach of any duty toward Nixon.

(c) and (d) In examining the opinion in respect of the negligence of Nixon, and upon the question of assumption of risk, we find the following language:

> ". . . . and the question raised is whether as toward the deceased, the defendant owed a duty to keep a lookout or whether on the other hand the deceased took the risk.
>
> If the accident had happened an hour later, when the deceased was inspecting the track we think there is no doubt that he would have been held to have assumed the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The Railroad Company was entitled to expect that self-protection from its employees."

The fair construction of the above language is that Nixon not only assumed the risk of being run down in a circumstance where the operator of the engine was not on the lookout but that by not keeping a continual watch himself, he was guilty of negligence which was the primary negligence and the sole proximate cause of the accident which caused his death.

If there was no duty in the Nixon case to warn Nixon, it is impossible that there could have been such a duty toward Rocco in the case at bar. Nixon was occupying the track at his usual time. There is no evidence, and the circumstances exclude as a possibility, that Nixon had any means of obtaining information as to the trains at or before the time he was killed. His back was toward the train that ran him down and he was proceeding in the same direction. A wind was blowing against Nixon and the train, thereby lessening the sound. It must be assumed that this Court determined that under the circumstances existing, the Railroad Company was under no duty to warn Nixon, for if it had been under such duty, it would not be excused by its failure to keep a proper lookout, thereby not seeing Nixon.

In the case at bar the plaintiff's very theory precludes any possibility that the engineer could see Rocco in time to avoid the accident, and unlike the Nixon case, Rocco had the duty, by the rules of the road, of ascertaining the location of the train that struck him and of avoiding it.

In comparing the negligence of Rocco and the negligence of Nixon, it appears that Nixon failed to look within a distance of perhaps 2000 feet while a train was bearing down on him. In the case at bar, we find that Rocco failed to get available information as to the location of the train which struck him and thereby failed to exercise that caution which he alone could use for his own protection. There is no possible explanation why Rocco's ability to watch the train was not equally as good as Nixon's. There is no reason why Rocco, charged with knowledge of the oncoming train, could not have got off his speeder, pushed it, and proceeded with care around the curve. No reason has been set forth why he did not wait in Ithaca the few minutes which would have had to elapse before the train which struck him would have reached Ithaca in its ordinary running time.

As to the assumption of risk arising from their duties, the cases cannot be differentiated. Rocco's duties were identical with those of Nixon's. Their equipment was exactly the same. Their duties were identical. Their risks were identical. Rocco however assumed an additional risk, one not necessary in his relation with his master. He undertook to proceed on the main track without the information which was available to him. He elected not to get the information which would have kept him off the track entirely until the passenger train had passed and which, at the very least, would have made him watchful, had he elected to proceed on the track depending upon his own watchfulness. He elected to engage in his dangerous enterprise unaware of danger, in unconcern of oncoming trains, his unconcern being evidenced by the fact that he stopped and conversed with the witness Stevens while even then the train was bearing down on him. (R. 61)

It is respectfully submitted that the opinion in the Nixon case must dispose of the case at bar. Every conclusion to be drawn from that opinion negatives the possibility that effect could be given to its doctrine only when there is a straight track, when the train is on time, and where the wind is not blowing. Within its doctrine and under the rules of the road, Rocco was required to "expect trains to run at any time, on any track, in either direction."

The opinion in the Nixon case contains no more than a restatement by this Court of the general rule which has been the doctrine in all jurisdictions in the United States since the commencement of railroad litigation. That doctrine may best be stated in the language contained in 4 Elliott on Railroads (3rd Edition) Section 1862, which is as follows:

> "Ordinarily section men or trackmen assume the risk incident to the running of trains, whether extra trains or trains running on schedule time. Such employees are bound to know that regular trains may be delayed and pass at uncertain intervals and that wild or extra trains may be sent over the road and they assume the risks of danger therefrom, except in cases where by some act or conduct the employer has impliedly or expressly represented that no wild or extra trains shall imperil the safety of such employees. It has also been held that the fact that the train was running at unusual rate of speed at the place of injury and in violation of a city ordinance does not relieve a section man from the rule that such employees assume the risk of wild as well as regular trains running over the tracks at all times at any rate of speed, without warning except from the noise of the train, and by the customary signals."

These words are given dignity and importance by the reference to them by this Court in the Nixon case and by the quotation in Watts v. Pere Marquette R. R. Co., 231

Mich. 40, as well as by frequent references to it in applicable cases in the Courts of many jurisdictions.

Chesapeake & Ohio Railroad Company v. Mihas, 280 U. S. 102

Aerkfetz v. Humphrey, 145 U. S. 418.

Reynolds v. New York, Ontario & Western Railroad, 42 Federal 2nd 164.

Carfellow v. Delaware, Lackawanna & Western R. R., 54 Federal 2nd 475.

Southern Railroad Co. v. Verelle, 57 Federal 2nd 1008.

Watts v. Pere Marquette Railroad Co., 231 Mich 40.

L. & N. R. R. Co. v. Vaughn, 204 Ky. 156.

Davis v. P. & R. R. R. Co., 276 Fed. 187.

Bennett v. A. T. & S. F. Ry. Co., 191 Iowa 1333, 183 N. W. 424.

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Davis as Director General v. Powell, 140 Va. 649.

N. & W. Ry. Co. v. Gesswine, 144 Fed. 56.

Biernacki v. Pennsylvania Railroad Co., 45 Federal 2nd 677 Certiorari denied 283 U. S. 841.

In the last cited case, Circuit Judge Chase, dissenting, stated as follows:

> "I agree that, after the Nixon case, it is not to be thought that the Railroad ordinarily owes any duty to warn any employee engaged in inspecting its track, of the approach of trains. Consequently, the employee assumes the risk of trains approaching without warning while he is at work."

The dissenting Judge then found occasion to differ with the majority on the grounds that there had been proven a custom of giving warning at the point in question. Though there was a dissent, this Court refused to grant certiorari.

Various expressions from the opinions in the cases cited above are indicative of the definiteness and force of the rule. In Bennett v. A. T. & S. F. Ry. Co., 191 Iowa 1333, 183 N. W. 424, the plaintiff's intestate was a trackwalker, was killed in the performance of his duties, and claimed negligence in the failure to give warning of the approach of a train. The Court said,

> "It is not customary, nor is it obligatory, to notify a trackman of the running of the trains by the railroad company; and although Bennett had a right to use the track in the performance of his duties, he was bound to know that a train might put in an appearance at any moment, and it was obligatory upon him to keep a lookout for his own safety." Page 1338.

In Kirkland v. Bixby, 222 S. W. 462, the Court said,

> "The rule in this state requires section men to protect themselves from passing trains. In other words, the train crew, so far as section men are concerned, have a right to expect a clear track, and the humanitarian rule (when violated) is the only salvation for the unfortunate section man."

The cases above cited abound with references which need not be cited here. The doctrine of the Nixon case is founded upon them and the Nixon case embodies the accepted view of the jurisdictions of this country.

POINT IV.

The negligence of Rocco was "Primary" as that word is used in this court.

In previous points Rocco's negligence has been discussed. The facts have been repeated and need not be set forth further at this time.

Recovery has been denied in this court in cases arising under the Federal Employers Liability Act upon the ground that the injured employee was guilty of primary negligence which resulted in his injuries in the following cases:

Davis v. Kennedy, 266 U. S. 147.

Unadilla Valley Railroad Co. v. Caldine, 278 U. S. 139.

Freese v. Chicago, Burlington & Quincy R. R. Co., 263 U. S. 1.

Southern Railway Co. v. Gray, 241 U. S. 333.

While the word "primary" was not used in the Nixon case, we believe that one of the reasons for this Court's decision in that case was that Nixon was guilty of primary negligence.

In each case where recovery has been denied under the Federal Employers Liability Act because the injured person was guilty of the primary negligence, we find that the injured or killed employee was primarily responsible for setting into motion those forces which caused his injury or defendant, but where Courts as a matter of law refused to compare the negligence of the defendant with that of the injured employee. It is often found to have been invoked in those cases where an employee, reckless of his own safety, places reliance on overcaution on the part of co-employees.

Great Northern R. R. Co. v. Wiles, 240 U. S. 444.

So in the case at bar Rocco set the forces into motion that brought about his disaster. His rights on the track were inferior to those of the train with which he collided. They were made inferior by rule, were inferior by law and

by custom. The very duties of Rocco as compared with the duties of the train crew made their respective rights inferior and superior respectively. The train ran on schedule, reported at stations, communicated with safety employees and its location was always known with reasonable certainty.

The work of Rocco was necessarily informal. He could not, and did not report, and he was admittedly compensated for his inferior rights and his special duties of caution by an efficient telegraph system which was always at his service. Notwithstanding his inferior rights, and his particular duty to exercise caution, he proceeded on his way without inquiry, unable to properly anticipate oncoming trains and in a manner as shown by the witness Stevens, of unconcern for oncoming trains. Within the cases cited above, his negligence was the primary negligence. That he would have been guilty of such negligence could not have been anticipated by the engineer of the regular train and his failure to anticipate that Rocco would be on the track was not the primary cause of the accident.

The cases decided by this Court and referred to by the Court of Appeals (R. 271) and in the dissenting opinion of the Appellate Division of the Supreme Court of the State of New York, (R. 261) were not decided upon any limited, constricted definition of the term "primary negligence". The foundation of the decisions and the reason for them may be stated in the language of this Court in the Caldine case.

> "He cannot hold the company liable for a disaster that followed disobedience of a rule intended to prevent it, when the disobedience was brought about and intended to be brought about by his own actions. Davis v. Kennedy, 266 U. S. 147."

Conclusion.

The Plaintiff-Petitioner asks that the judgment of the Trial Court be reinstated. The Court of Appeals of New York has rendered its decision upon the law in the case. It thereupon became unnecessary for the Court of Appeals to give consideration to those matters in the conduct of the trial of the case which the Defendant-Respondent has claimed, throughout the litigation, to have been errors on the part of the trial Justice in the reception of evidence and in the charge. There has been discussed in this brief the question of errors in the reception in evidence of inapplicable rules and in the trial Justice's permitting the jury to speculate upon their meaning and applicability. (Charge of the Trial Court R. 225, 226, 227) The trial Court also permitted the jury to speculate on, and determine as it saw fit, the force and effect of the rule which required the decedent to inquire as to the location of trains. (R. 230, 231) Without any evidence of any kind that the rule was not in full force and effect, except that on two occasions Rocco violated it and was reprimanded, the Court permitted the jury to find the rule flexible or inflexible as it saw fit. The effect of such a charge, to which exception was duly taken, (R. 242) was to permit the jury to find that an employee might abrogate a rule promulgated for his own safety and the safety of all persons on the railroad, by disobeying the rule.

These matters were not required to be passed upon by the Court of Appeals of New York and are pointed out here that this Court may see the foundation of, and the reason for, a verdict for the plaintiff upon the trial.

It is respectfully submitted that the judgment of the Supreme Court of the State of New York, based upon the Remittitur of the Court of Appeals of the State of New York should be affirmed.

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